

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN SECTION

.....
Zbignew Lesniak .
v. . Civil No.
..... **11-12100-MAP**
Konica Minolta Business .
Solutions .
.....

Before the Honorable Michael A. Ponsor,
United States District Court Judge,
Motion Hearing Held on **May 23, 2012.**

APPEARANCES:

For the plaintiff: Richard Burch, 8 Greenway Plaza, Suite
1500, Houston, TX 77046.

For the defendant: Barry Miller, Two Seaport Lane, Suite
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1 **(Court commenced at 2:04.)**

2 THE CLERK: Your Honor, this is the matter of
3 Lesniak versus Konica Minolta Business Solutions, Civil
4 Action 11-12100.

5 THE COURT: All right. This is a class action
6 complaint brought under the Massachusetts wage and hour
7 law alleging that certain employees of the defendant did
8 not receive compensation that they were entitled to under
9 the statute.

10 The case was originally filed in state court in
11 Hampden County and was removed here by the defendants last
12 November under the Class Action Fairness Act. The
13 plaintiff has moved to remand the case to state court
14 claiming that the defendant cannot meet its burden to show
15 that the case involves one hundred or more members of the
16 proposed class and an amount in controversy in excess of
17 \$5 million.

18 The parties have submitted memoranda in support of
19 and in opposition to the motion, and the plaintiff says
20 that there are only 83 potential class members even though
21 the complaint at paragraph 23 refers to, I believe, refers
22 to hundreds of class members.

23 Paragraph 23 of the complaint says "Although
24 plaintiff does not know the precise number of members of
25 the proposed class, there are hundreds and the members of

1 each class are numerous and geographically dispersed."

2 The defendant has submitted its own mathematics
3 suggesting that counting workers that are employed in
4 Massachusetts even though they may be living in a
5 neighboring state, there are at least 118 employees who
6 are potential class members and that the mathematics of
7 the hours put the aggregate, even without doubling or
8 trebling, at over \$6 million in potential damages. So
9 that's the horse race that I guess we have here this
10 afternoon.

11 May I ask each of you to introduce yourselves? I
12 frankly don't know who's got which party here. I'll start
13 over here.

14 MR. BURCH: Good afternoon, Judge. I'm Rex
15 Burch and I represent the plaintiff Mr. Lesniak.

16 THE COURT: How do you spell your last name?

17 MR. BURCH: B-u-r-c-h.

18 THE COURT: That's easy. All right. Thank you
19 very much.

20 MR. BURCH: Thank you.

21 MR. MILLER: Good afternoon, Your Honor. Barry
22 Miller for the defendant Konica Minolta.

23 THE COURT: Okay. So, Mr. Burch, it's your
24 motion and tell me why based on the record that I have
25 before me now the defendant cannot carry its burden.

1 MR. BURCH: Absolutely, Judge. I'd like to
2 start by noting that in the complaint at paragraph 9
3 plaintiff alleges that Konica employed less than 100
4 workers in Massachusetts in the relevant time period.
5 That's the last sentence of paragraph 9 where it says
6 "within the applicable limitations periods, Konica has
7 employed nearly" --

8 THE COURT: Nearly. Okay.

9 MR. BURCH: -- "nearly 100 technical support
10 workers in Massachusetts."

11 The defendants have submitted in opposition to our --
12 in their notice of removal, they did not cite any evidence
13 supporting the fact that there were more than 100 or
14 frankly that there was more than \$5 million at issue. In
15 their response, they --

16 THE COURT: Five hundred -- \$5 million.

17 MR. BURCH: I'm sorry, did I say 500,000?

18 THE COURT: I think you said \$500.

19 MR. BURCH: Even worse. There is more than 500.

20 When we filed our motion to remand, they did file a
21 response and there are some class members who we agree are
22 properly part of the class. There are 66 folks who were
23 Massachusetts residents who were assigned to a
24 Massachusetts Konica branch and who performed service
25 calls in Massachusetts.

1 It seems to us those folks are clearly class members.
2 Where Konica goes awry is that they have added 28 people
3 presumably to get them over the one hundred limit who did
4 not reside in Massachusetts, who were not assigned to a
5 Massachusetts branch but who occasionally did jobs in
6 Massachusetts.

7 The question of whether or not somebody is employed
8 in a particular state under wage and hour laws, that comes
9 up a lot. It's come up in Washington state; it's come up
10 in New Jersey; it's come up in North Carolina. That issue
11 comes up all the time, and uniformly those courts look to
12 where the relationship is grounded.

13 Where does -- where do the substantial parts of the
14 employment relationship lie? Under that analysis, which
15 is also the restatement analysis just for general choice
16 of law issues, there's no way that they can make it.

17 Let me just give you some examples. Just pulling
18 from their spreadsheets, if we look at their spreadsheet
19 there are 21 people who, even if we spread out the calls
20 and are most favorable to them, average less than two
21 calls per week in Massachusetts. And based on the
22 evidence they submitted, we're looking at, you know,
23 somewhere between 15 and 25 average calls per week worked
24 by these workers, and so two calls per week would be a
25 tiny fraction of that, and again that's assuming that we

1 spread those calls out in a way that's most advantageous
2 to them averaging them across all their work weeks.

3 THE COURT: Are you saying that if this case
4 goes forward, or when this case goes forward, you won't be
5 seeking damages for any of those 21 people? I mean will
6 you be looking for -- assuming you prevail, will you be
7 looking for money from the defendant to reimburse those 21
8 or so workers for wages that they were entitled to under
9 the Massachusetts statute but did not receive?

10 MR. BURCH: Well, that's the rub, Judge, is
11 whether or not they're entitled to it under the
12 Massachusetts statute. The Massachusetts state uses
13 well-worn language. It uses employed in --

14 THE COURT: I see.

15 MR. BURCH: -- which is different from say
16 California's wage and hour statute which used work
17 performed in.

18 THE COURT: I see.

19 MR. BURCH: And under statutes that say employed
20 in, you look to where the majority of the important
21 contacts are, where the employment relationship is
22 grounded. For example --

23 THE COURT: Let me just insert another question.
24 I'm sorry. I know you will get on to your example and I
25 may forget my question.

1 If you were to stand in front of me and say we waive,
2 we abandon, we state explicitly on the record we are never
3 going to seek compensation for any of these 28 or 21
4 workers who worked outside of Massachusetts and who only
5 occasionally come into Massachusetts, I don't know whether
6 that would persuade me but it would impress me. So I
7 guess the question is, is that what you're saying? These
8 people are just not people we're looking for damages for?

9 MR. BURCH: They are not. They are not people
10 that were included in our class. I mean, we know what
11 employed in means. Right? We have -- to get back to my
12 example, we have looked at courts and cases such as
13 Bostain v. Food Express, Kramer v. Nowak, we've looked at
14 those cases and what does that mean, and what that means
15 is somebody who has some significant relationship with the
16 forum state.

17 If you're a resident of Massachusetts, for example,
18 that makes perfect sense that Massachusetts intends to
19 protect its citizens. You're entitled to protection.
20 That's not the group of folks we are talking about here.

21 The group of folks we are talking about here are
22 people who only occasionally, and a very small percentage
23 of their work, ever worked in the State of Massachusetts.

24 I mean, by Konica's definition of who's included in
25 this class, somebody can do one call in five weeks, one

1 call, okay, so one-twentieth of the calls they do in a
2 week in a five-week period and they're entitled to bring
3 an overtime claim for all of the work performed in that
4 week under Massachusetts law. That to me -- while perhaps
5 I would like it in the abstract, I mean, Massachusetts has
6 very good wage and hour laws and all that, that just
7 doesn't seem like a workable rule to me.

8 THE COURT: Okay. Let me just take an
9 opportunity to educate myself about how this all works.

10 So I was assuming, well, two things. I wasn't
11 assuming anything in terms of the sentence that I'm about
12 to produce, but I did think that if I were a worker and I
13 lived in Connecticut and I worked most of my time in
14 Connecticut and occasionally came up to Massachusetts, I
15 might very well, using common parlance or just common
16 sense ordinary English, say, well, you know, I'm up in
17 Agawam right now. I'm employed in Agawam. I'm working.
18 I'm employed here. I'm going out about my work. So in
19 some broad colloquial sense a person might say that he was
20 employed in Massachusetts.

21 So if there was a class action, I guess I was
22 assuming, and now I'm getting to the assuming part, that
23 you would claim that the Massachusetts statute would
24 govern the obligations that the defendant has to provide
25 wages for the employees while they are in Massachusetts

1 and to the extent that activities that they conduct in
2 Massachusetts are not properly compensated, they would be
3 looking for money for that.

4 If I'm John Smith and I spent five percent or ten
5 percent of my time in the Commonwealth of Massachusetts
6 servicing customers here, I might only get five or ten
7 percent of an individual's recovery, but I would be happy
8 to get that modest but tasty check from the litigation.

9 You're saying that's not how it works. At least I'm
10 inferring from what you're saying that's not how it works.
11 You're going to be looking at all the hours that somebody
12 works and in that case you would have the Massachusetts
13 tail wagging the Connecticut dog in terms of calculation
14 of the plaintiff's entitlement, assuming you show
15 liability. Is that how that works?

16 MR. BURCH: It would seem to me that somebody
17 who works, to use Konica's example, 96 percent of their
18 time in Connecticut and 4 percent of their time
19 sporadically in Massachusetts does not have a claim under
20 Massachusetts wage and hour law.

21 To follow up on Your Honor's point, I mean, I think
22 it's important to look at what most of the off-the-clock
23 work being alleged here is. Most of it is at home or
24 traveling. Since these people are nonresidents, it is by
25 definition occurring outside the State of Massachusetts

1 because, as alleged in our complaint, it's the work we're
2 complaining about largely is performed at home.

3 And so a guy in Connecticut -- a guy in the general
4 sense -- a guy in Connecticut who works an hour off the
5 clock in Connecticut and then drives up to Massachusetts,
6 does one job, comes back, does another four jobs in
7 Connecticut, the complaint is about work that was being
8 performed at home, at least in my hypothetical right
9 there, and so how would that gentleman in good conscience
10 be able to come in and say I should be able to sue you
11 under Massachusetts wage and hour?

12 THE COURT: Let me ask another question. If you
13 subtract these 21 people, does the arithmetic come out to
14 where you're under a hundred?

15 MR. BURCH: Yes, absolutely.

16 THE COURT: Okay. And let me hear from counsel
17 for -- Mr. Miller counsel for defendant here.

18 MR. MILLER: Thank you, Your Honor. We do take
19 a very different view of both the applicable law and of
20 the contentions that frame the jurisdictional issue here.

21 It is not the case that a single worker is fish or
22 foul for purpose of wage and hour laws. It is not the
23 case that their entire employment relationship is governed
24 by the laws of a single state, much less are they limited
25 to the state in which they reside in terms of the wage and

1 hours that govern their employment. This is something
2 that is well established.

3 Mr. Burch made reference to the statutory language,
4 which is the beginning of the inquiry but it's not the end
5 of the inquiry. There are at least two recent court
6 decisions that have answered the very question that Your
7 Honor posed. The question being: Does Massachusetts law
8 apply to individuals who traveled to Massachusetts on an
9 itinerate basis to perform work within the Commonwealth?

10 The first case came from Judge Lauriat in the
11 business litigation session of Massachusetts superior
12 court. He, of course, is well positioned to interpret the
13 Massachusetts wage and hour laws.

14 THE COURT: A very well-respected superior court
15 judge.

16 MR. MILLER: Indeed. In a case captioned Dow v.
17 Casale, which is cited in our papers, Judge Lauriat looked
18 at the situation of a resident of the State of Florida who
19 worked for a company that was based in Connecticut and
20 traveled to Massachusetts 20 times over a period of two
21 years, so about ten times per year, and under those
22 circumstances Judge Lauriat said, yes, the Massachusetts
23 wage and hour laws do apply to the activities that this
24 plaintiff, Mr. Dow, performed in Massachusetts.

25 He went through a rigorous statutory analysis and he

1 looked at the statutory language that Mr. Burch provided,
2 and he said that language is open ended. It does not in
3 any way constrain the application of the statute to
4 individuals who reside here, nor does it exclude
5 individuals who work for an employer that is based
6 somewhere else. It does not exclude individuals who
7 reside somewhere else.

8 So based on the case most directly interpreting that
9 question, the application of the Massachusetts wage and
10 hour laws would reach all 28 of the individuals that we
11 contend are relevant for jurisdictional purposes.

12 I should correct the record. I think Mr. Burch
13 misspoke when he said that there were 66 individuals on
14 our list with Massachusetts addresses. In fact, there are
15 86 or rather 84, I'm sorry. There are six who are
16 assigned to Massachusetts branches which means that the
17 number of people needed to bring us to a hundred, the
18 jurisdictional threshold, is ten.

19 The top ten people on our list who resided elsewhere
20 but traveled to Massachusetts in order to perform work
21 here did so very frequently. The specific frequency is
22 digested in the evidence that we submitted in support of
23 our papers, but on average it breaks down to this: One to
24 15 service calls in Massachusetts per person per week.
25 That is well above the threshold of 20 trips to

1 Massachusetts in two weeks. In fact, we set the threshold
2 that we set to capture those 28 people based on Judge
3 Lauriat's reasoning in the Dow case because those 28
4 people all made more than ten trips into Massachusetts per
5 year.

6 Now we're not going to take the position as to where
7 exactly the threshold is, but Judge Lauriat already did
8 that in one case and he said the threshold is certainly
9 not lower than ten trips per year.

10 THE COURT: Let me go back and say what you said
11 to me and make sure I understand the arithmetic.

12 I think you said that there were some 84 people as to
13 whom there's no contest; that is, these are people who
14 live in Massachusetts who are assigned to outlets existing
15 in Massachusetts, no question about it, and there's six
16 other people who live outside Massachusetts but are
17 assigned to, I don't know whether they would be called
18 centers or offices or shops or whatever in Massachusetts.

19 So they're commuting from outside of Massachusetts
20 but actually their place of employment under any
21 construction of that term is in Massachusetts, and then
22 you say out of the remaining 21 or so that are contested,
23 if you take the ten who appear here the most, you're
24 talking about a group of people who are coming into
25 Massachusetts one to 15 times per week.

1 MR. MILLER: That's correct. I should correct
2 that slightly. I'm not sure that it makes a difference
3 but just because Your Honor is trying to correct the
4 record, I should be specific. 84 people on the list are
5 resident here. That number doesn't take into account the
6 branch to which they're assigned. Six people were not
7 resident in Massachusetts but were assigned to a
8 Massachusetts branch, and then 28 people follow the
9 threshold that Judge Lauriat said, and I think it is worth
10 commenting on the fact that these people don't actually
11 spend the majority of their employment at an assigned
12 branch.

13 One thing that's not yet necessarily fully flushed in
14 the record but I think Mr. Burch and I can agree that
15 these people are field service personnel. So they spend
16 their entire day, for the most part, on the road, and the
17 analogy that Mr. Burch gave or the example that he gave of
18 someone who works at home and then travels into
19 Massachusetts I think illustrates why Massachusetts wage
20 and hour law would potentially apply to that relationship
21 because part of what they're trying to recover here is the
22 travel that individuals undertake after they leave their
23 home that they incur getting to their first job site.

24 So if they live in Hartford and they do some work at
25 home, that is enough to make them on the clock and enough

1 to begin their workday. They drive up to Springfield and
2 they do three calls in Springfield, the travel time is
3 going to be counted and potential the travel time back
4 would be counted as well.

5 THE COURT: Now, let me put a question to you
6 that I tried to put to Mr. Burch. I think I managed to
7 make it fairly clear and I think he understood it, and the
8 question is this: Do you view your client as vulnerable
9 to claims for all the hours that these individuals may
10 have worked for your client?

11 I'm speaking now of the 28 or the ten who live
12 outside Massachusetts and come into Massachusetts
13 intermittently, or are you viewing your client as exposed
14 to wage claims only for the hours, for example, the travel
15 hours which the plaintiff alleges they weren't compensated
16 for after they crossed the Massachusetts line and get to
17 Longmeadow or Agawam or wherever in Massachusetts to do
18 their field work?

19 MR. MILLER: Well, Your Honor, first in response
20 to that I would say defendant's position is it doesn't
21 matter for the jurisdictional inquiry because what is
22 relevant for jurisdictional inquiry is the amount in
23 controversy. It's what they could seek based on the face
24 of their complaint and defendant's response to their
25 allegations is just immaterial for purposes of

1 jurisdiction.

2 Of course, the defendant contends that it has a
3 little or no liability here, but that's not relevant for
4 the jurisdictional inquiry.

5 I think, as an academic matter, among this group of
6 28 people that make up the margin over one hundred class
7 members, there's going to be different analyses that need
8 to be performed.

9 For example, if someone lives just over the
10 Connecticut border and performs 15 service calls in
11 Massachusetts per week, that person could argue that their
12 entire employment relationship was governed by
13 Massachusetts law applying an argument similar to the one
14 that Mr. Burch offered.

15 We don't know if they're going to do that or not but
16 they certainly could. We reserve the right to defend on
17 the grounds that, to the extent that we have any liability
18 here, it would be limited to hours worked in
19 Massachusetts, but I don't think that changes the
20 jurisdictional analysis.

21 THE COURT: One other question in terms of the
22 \$5 million threshold. Does the case law -- and I could
23 have researched this but I didn't look at it, does the
24 case law require or permit the court to take into
25 consideration a potential trebling of the damages?

1 MR. MILLER: It does, Your Honor. In fact, it's
2 required. It's not permissive. I can provide a citation
3 for that.

4 MR. BURCH: It does, Your Honor.

5 THE COURT: Okay. So if the number is two
6 million and there is a risk of trebling, you're up to six
7 million and you're over the threshold.

8 MR. MILLER: Exactly.

9 THE COURT: In your case you say the number is
10 six million and change and the trebling brings it up to
11 the neighborhood of 20 million.

12 MR. MILLER: That was our position at the time
13 that we opposed the motion to remand. I should observe
14 Mr. Burch notes that we didn't include any evidence in our
15 removal petition. It's clear that that's not required.
16 To the extent that the Court is interested, I can provide
17 a citation for that too.

18 The Court should take into consideration evidence
19 bearing, no matter when submitted, on the amount in
20 controversy at the time the case was removed. And at the
21 time the case was removed, our best understanding of
22 plaintiff's position was that these people worked on
23 average fourteen and a half hours off the clock per week
24 and that's the genesis of the number that is provided in
25 our opposition to the motion to remand. I don't know if

1 it has yet come across Your Honor's desk.

2 THE COURT: Your supplement, yes, you say that
3 in Chicago there's a piece of litigation in which the
4 numbers are comparable to the numbers that you have
5 suggested here.

6 MR. MILLER: They certainly are well over the
7 amount that they would need to be to meet the amount in
8 controversy requirement.

9 The model that we supplied with our opposition to the
10 motion to remand is a very rigorous analysis of the actual
11 weeks worked by the 118 people that we believe are clearly
12 relevant for purposes of the jurisdictional analysis here.
13 There's no guesswork or rounding in it. It's the actual
14 weeks they worked multiplied by their hourly rate, and the
15 only variable to plug into that analysis is the hours that
16 plaintiffs are going to contend they worked off the clock.
17 We have no records of that. There's no way that we can
18 supply it, but based on fourteen and a half hours, you get
19 to the \$6 million plus single damages number.

20 For it to come below \$5 million, plaintiffs would
21 have to take the position that they worked less than 3.75
22 hours per week on average. At 3.75 hours per week on
23 average, if you do the math and multiply it through, you
24 get an amount that single damages in excess of 1.67
25 million and treble damages in excess of \$5 million.

1 What we can tell from those affidavits and from the
2 expert report that Mr. Burch and his co-counsel have
3 submitted in the companion case is there's no reasonable
4 probability, which is the standard here, both sides agree,
5 that the court looks at whether there's a reasonable
6 probability that the jurisdictional threshold is met.

7 THE COURT: Let me just insert another question
8 because it's always nice if you can grab any opportunity I
9 have to educate myself.

10 Aside from the fact that you have this beautiful
11 courthouse, this wonderful federal courthouse, does the
12 defendant have any other advantage in removing this case
13 to federal court?

14 I don't mean tactical advantages or litigation
15 advantage? The question I really mean is does the class
16 Action Fairness Act, which allows you to remove the case
17 here to federal court, include any provisions which make
18 as a statutory matter the plaintiff's job tougher to win
19 his case, or is the difference instead of being down the
20 street in the Hampden County Superior Court you're up the
21 street here in federal court?

22 MR. MILLER: Certainly we appreciate Your
23 Honor's hospitality in the courthouse.

24 THE COURT: That's fine. I'm sure you both do
25 and all that, but does the statute say that the burden on

1 the plaintiff is higher or the standard that the plaintiff
2 has to reach is higher, or the amount of damages that the
3 plaintiff can potentially obtain is less or something like
4 that?

5 MR. MILLER: The Class Action Fairness Act
6 doesn't address any of those issues, Your Honor. It does
7 have provisions in addition to the jurisdictional
8 provisions that govern, for example, certain things that
9 would have to happen in the context of settlement

10 Pursuant to 28 U.S.C. 1715 if we settled the case, we
11 would have to provide notice to the State Attorney
12 General, and there are consumer protections built in. It
13 is in my view, and Mr. Burch obviously can state his own,
14 that the Class Action Fairness Act itself doesn't really
15 change the burden that plaintiffs carry.

16 In defendant's view, other aspects of the federal
17 procedural rules are better constructed in federal court
18 and more favorable to defendants in federal court in that
19 it is less likely under the federal rules that a class
20 action that poses serious due process issues in the way
21 the Supreme Court recently analyzed the Dukes v. Wal-Mart
22 case would be certified.

23 The state court has yet to reach that issue so in
24 addition to the different resources available at the
25 federal level versus the state level, defendants, and this

1 is not just Konica, all defendants will generally prefer
2 to be in federal court.

3 THE COURT: Okay. Let me give you a couple
4 minutes to respond, Mr. Burch. You've got a difference
5 with regard to the law it would appear, and even without
6 the difference with regard to the law, what about the top
7 ten? This is a little bit like the Hit Parade here. He's
8 picked his top ten employees and he says they're in here
9 in plenty of time and there's this Dow case of Judge
10 Lauriat's. I never met Judge Lauriat but I know what his
11 reputation is.

12 MR. BURCH: Well, I'll tell you, Judge, Judge
13 Lauriat, I like that case, Dow versus -- we call it
14 Casale. I don't even know if that's right, but it's Dow
15 v. Casale. We call it the Casale case.

16 I like that case because he basically adopts the view
17 that I'm telling you, because in that case the location
18 that the work was performed was not considered primary
19 because the location of the work was outside of
20 Massachusetts.

21 What was considered primary by him was the fact that
22 we are dealing with a Massachusetts employer in that case,
23 and in this case we are unequivocally not dealing with a
24 Massachusetts employer. As Konica admits in their notice
25 of removal, they are an employer from either New York or

1 New Jersey or maybe both if Mr. Miller's amalgamation of
2 laws has some persuasive value to you.

3 In that case Judge Lauriat said, look, we've got a
4 Massachusetts business; we got an employee who had a
5 Massachusetts business address whose customers sent all
6 their paperwork through Massachusetts; his phone rang in
7 Massachusetts; his fax rang in Massachusetts; his mail
8 went to Massachusetts; he was a salesman so he's by
9 definition out of the office a lot. So where is this
10 centrality of his employment? The centrality of his
11 employment is at the Massachusetts office which, by the
12 way, was the defendant's only office. They only had an
13 office in Massachusetts.

14 If you look at the language of the statute, it talks
15 about employers in the Commonwealth. So obviously the
16 legislature had in mind to pay particular attention to
17 employers who were headquartered or home base was in
18 Massachusetts.

19 So it seems to me that by focusing on Dow v. Casale
20 they're basically admitting that you don't primarily weigh
21 where the work was performed, especially when you're
22 talking about a tiny fraction of the work being performed
23 in Massachusetts.

24 I do want to follow up on a very important point that
25 Mr. Miller and I agree on, and that is we're construing

1 our complaint and the question for the judge to answer is
2 what does our complaint say?

3 We have said -- we have used language that has been
4 used in numerous cases, employed in, and employed in under
5 the restatement under most of the cases that -- well,
6 every case that I have seen that construes that phrase,
7 you look to where the employment is grounded.

8 I agree that with respect to folks that are assigned
9 to a branch in Konica, reside in Konica and do service
10 calls in Konica, all those people are clearly in and
11 that's the 66. By the way, all three live in --

12 THE COURT: Did you say 66?

13 MR. BURCH: There are 66 who reside in
14 Massachusetts, are assigned to a Massachusetts branch, and
15 do service calls in Massachusetts, all three. That's
16 where the 66 comes from. I think there was a disagreement
17 as to whether or not that was people who just reside in.
18 There are more people who reside in Massachusetts, and we
19 are not quibbling about anybody who resides in
20 Massachusetts.

21 The question here is whether these 28 people who
22 reside outside of Massachusetts --

23 THE COURT: I'm beginning to feel like Senator
24 McCarthy and the number of communists in the State
25 Department. There's a lot of numbers that are flying

1 around here and I'm getting confused. Sixty-six is a new
2 number to me. I thought we were talking about 84
3 before.

4 MR. BURCH: That's fine as well. There are 84
5 Massachusetts residents, and regardless of anything else,
6 if you're a Massachusetts resident, to me you're covered.

7 THE COURT: Okay.

8 MR. BURCH: So there's no quibbling with respect
9 to those 84. I think where our disagreement is is with
10 respect to the 28 people who do not reside in
11 Massachusetts and who are not assigned to a Massachusetts
12 branch.

13 THE COURT: Now I think that again -- this is
14 just perhaps I'm giving too much attention to the trees
15 rather than the forest or maybe even the twigs, but I
16 thought that Mr. Miller said that there were at least six
17 who resided outside of Massachusetts but that were
18 assigned to a Massachusetts branch, and that sounds like
19 what Judge Lauriat was talking about. They have an
20 office; their phone rings there.

21 MR. BURCH: Right.

22 THE COURT: So we're up to 90 who are either
23 Massachusetts residents or out-of-state residents working
24 for a Massachusetts branch. So all I have to do -- all
25 you have to do is fight off nine or eleven of those

1 remaining ones and so you're down to 99, and all he has to
2 do is to get up to ten and we're there. That seems to be
3 what the math is.

4 Well, I guess I'll have to take a close look at Judge
5 Lauriat's decision, but I'm not sure that I need anything
6 else from you.

7 Did you want to comment on my sort of global question
8 about whether, and again don't take this personally,
9 whether there's anything that puts you at a disadvantage
10 substantively here in federal court based upon the CAFA or
11 whether you just made the decision you'd rather be in
12 Hampden Court? That Hampden Superior Court, they have
13 fabulous judges down there and that's where you filed it
14 and that's where you want to be. Substantively it's the
15 same law presumably and that CAFA doesn't put you in any
16 greater disadvantage, or does it?

17 MR. BURCH: Well, I think Mr. Miller was
18 accurate. I mean, there are aspects of CAFA that impact
19 how you can settle, notices that have to be given to
20 States Attorney Generals and things like that.

21 I think what's important to remember about CAFA is
22 that what it was really designed to get at is sort of
23 these sprawling state court class actions that go over
24 many states which is not what we have here.

25 THE COURT: Right. You're always reading these

1 lurid stories of some tiny little court in a corner of
2 some obscure state that is suddenly awarding a hundred
3 billion dollars against some corporation that sued there
4 and a generous appeals court was affirming and this was a
5 problem that people were concerned about. We don't have
6 that problem here.

7 MR. BURCH: We don't have that here, and I think
8 that the -- I would agree that the standards for class
9 certification are different in Massachusetts state court
10 than they are in federal court.

11 I don't know how much difference that makes. It's
12 clearly important to Konica but that's why this case got
13 removed in Rex's estimation.

14 THE COURT: Well, I don't think I need any more
15 in terms of oral argument. I was hoping to come out here
16 and rule from the bench, but I do want to take a look at
17 the Dow v. Casale case, if that's what it is, and I should
18 be able to get you a prompt ruling.

19 MR. MILLER: Your Honor, I actually mentioned
20 that there were two authorities that bear on the issue and
21 I think we got sidetracked a little bit. Dow v. Casale is
22 one and at the time we opposed --

23 THE COURT: You can have a seat, Mr. Burch.
24 I'll give you a chance.

25 MR. BURCH: Absolutely.

1 MR. MILLER: At the time we opposed plaintiffs'
2 motion to remand, we didn't know what their position was
3 as to who was in and who was out. We didn't have the
4 benefit of Mr. Burch's analysis that he's provided here
5 today, but the second case that bears on this is a case
6 that Judge Gorton decided in 2010. It's called Gonyou,
7 G-o-n-y-o-u, Gonyou v Trywire Engineering Solutions. It's
8 717, F.Supp 2nd, 152, and Judge Gorton undertook a similar
9 analysis to the analysis that Judge Lauriat undertook.

10 I won't belabor the point, but it is our view that
11 Judge Gorton's analysis in that case where he found that
12 an entity that was not based in Massachusetts, it was
13 based in Connecticut, could be sued under the
14 Massachusetts wage and hour laws.

15 MR. BURCH: It actually is a Massachusetts case.

16 MR. MILLER: Okay. I may have misspoken but the
17 gist of the Gonyou case is that the Massachusetts statutes
18 can be given broad application in a way that is
19 inconsistent with the analysis that Mr. Burch has offered.

20 Instead of a centrality type analysis of the type Mr.
21 Burch has offered, they talk about sufficient contacts.
22 It's almost like an International Shoe minimum contacts
23 jurisdictional analysis. And just as in the
24 jurisdictional analysis under International Shoe, an
25 entity can be subject to jurisdiction of more than one

1 court. That's our view on the additional authorities.

2 THE COURT: Okay. You didn't get a chance to
3 talk about Gonyou and if you'd like to get your two cents
4 in on that case, I would be happy to hear it.

5 MR. BURCH: Thank you. I would just like to
6 mention that in Gonyou we were dealing with a
7 Massachusetts resident working for a Massachusetts
8 company.

9 Again, they sort of did an analysis of what has the
10 primary relationship to the employment relationship
11 because wage and hour -- and I think this is a common
12 theme that you will see through all these cases. Wage and
13 hour laws sort of deal with the employment relationship.
14 Right?

15 The laws like workplace safety laws, they deal with a
16 place. They deal with something tangible, but an
17 employment relationship is an intangible, and in those
18 instances you will see cases like, for example, the cases
19 that, with Your Honor's permission, I'm going to send you
20 three case citations, but in the Ponos case from North
21 Carolina you had --

22 THE COURT: Is this in your memo, this case that
23 you are giving me right now?

24 MR. BURCH: It is not. My understanding of how
25 Your Honor likes to do things, and maybe I've been

1 misinformed, was we file a motion, they file their
2 response, and absent extraordinary circumstances, no
3 replies.

4 THE COURT: Sure. I'll certainly give you a
5 chance to send me these case citations, but if that's
6 going to be the case, then I want to give Mr. Miller a
7 chance to respond to your additional cases.

8 MR. BURCH: The thing is I don't want to create
9 additional work for you. I'm certainly sympathetic --

10 THE COURT: No worry.

11 MR. BURCH: -- to you, but I did want to -- I do
12 want to at least give you the citation which is 677,
13 Southeast 2nd 868. In that case the plaintiffs sought to
14 sue under North Carolina's wage and hour law and he was in
15 the state 18 days. He did conference calls regular in
16 that state and the North Carolina court said, no, you
17 don't get to sue under our law just because you sort of
18 incidentally come into contact with our state.

19 I think if you look at the Bostain v. Food Express,
20 which is 153, Pacific 3rd, 846 Washington, 2007, as well
21 as Kramer v. Nowak, which is 908, F.Supp 1281 out of the
22 eastern district of Pennsylvania that deals with New
23 Jersey law, I think you will find that that's a common
24 theme.

25 THE COURT: Well, all right. I'll take a look

1 at this material and get you a ruling.

2 If the motion to remand is allowed, it's one less
3 donut in my cupboard. If the motion to remand is denied,
4 then I'm going to be sending you along to Judge Neiman for
5 a Rule 16 conference.

6 I'm tempted -- well, no, I think that's what I will
7 do. If the motion to remand is denied, the case will be
8 referred to Magistrate Neiman and he will be issuing an
9 order for you to appear before him and put together a
10 schedule for the completion of pretrial proceedings which
11 will include a motion for class certification and various
12 other things that you are going to be working on.

13 As I say, if I allow the motion to remand, then it
14 will be up to the judges down the street to get the case
15 on track through whatever mechanisms they have.

16 Thank you very much. It's been an interesting
17 argument and I will get you a prompt ruling.

18 MR. MILLER: Thank you.

19 MR. BURCH: Thank you, Your Honor.

20 THE COURT: Court's in recess.

21 **(Court recessed at 2:45.)**

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C E R T I F I C A T E

I, Alice Moran, Official Federal Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Alice Moran

Dated June 7, 2012

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